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CURRENT DEVELOPMENTS UNDER PROPOSITIONS 13, 62 & 218

1. Utility Users Tax Litigation

Most utility users taxes ordinances in California date from a model ordinance developed by the League of California Cities in the mid-1980s after negotiations with the major utilities. Since that time, the telecommunications industry has been completely transformed with the break up of Ma Bell, the demise of telegrams, and the internet revolution. Now that Propositions 62 and 218 require voter approval of any change in the "methodology" by which a tax is administered (Government Code § 53750(h)), the telephone carriers – Verizon lead among them – have begun to use litigation as a means to reduce the scope of utility taxes as applied to their services. Two pending cases of note are:

Palo Alto v. Verizon (Santa Clara Superior Court) is the City's effort to enforce its UUT as to Verizon's services to customers who receive "bundled" or "packages" of both local and long-distance calls on cellular and wireline phones for flat monthly fees. The trial court granted Verizon's motion for summary judgment, concluding that such bundled services were neither "local" nor "long distance" telephone calls taxable under the Federal Excise Tax on Telephones (FET), 42 U.S.C. 4251 et seq. The League's model UUT, adopted by Palo Alto, exempts from the local utility tax telephone calls – such as those paid by coin in phone booths – which are exempt from the FET. The City succeeded in its motion for new trial, but an appeal to the 6th District Court of Appeal is likely when the case is final. News coverage of the trial court ruling also spawned a pending class action suit for refunds. Such a suit can be precluded if the taxing agency has a modern claiming ordinance as authorized by Government Code § 935. A model of such an ordinance may be found at www.cllaw.us/papers.htm.

Subsequent to the events in Palo Alto, the IRS issued its Notice 2006-50, effective July 31, 2006, which acquiesces in the federal court rulings cited by the Santa Clara Superior Court in the Palo Alto case, and determining that the FET does not apply to long distance calls which are not billed on *both* the bases of time and distance (and distance is frequently excluded from

nationwide "one-rate" plans). However, the IRS notice went further, and narrowed the FET to separately billed local services, eliminating the tax on bundled charges for both taxable and non-taxable calls, despite express language in the FET and in the Mobile Telecommunications Sourcing Act of 2000, 4 U.S.C. §§ 116 et seq. (MTSA), that the FET applies to bundled charges and state and local telephone taxes on cellular telephony may be applied to bundled charges. Following the IRS notice, efforts in Congress to repeal the FET gained new vigor. Plainly, the 110+ cities and counties in California with UUTs on telephony need to review their taxes in light of these developments. A fuller discussion of these issues is beyond the scope of this paper, however, as another presenter at this conference will cover this topic in detail.

Verizon Wireless v. Los Angeles (2nd District Court of Appeal, Case No. B185373) involves Los Angeles' effort to apply its UUT to the call detail portion of cellular telephone bills. Prior to the adoption of the Mobile Telecommunications Sourcing Act (MTSA) by Congress in 2000, cellular carriers argued that the federal Constitution forbade the application of a UUT to telephone calls which neither originated nor destinated in the taxing city. Because the wireless carriers had not developed technology to track the origin and destination of calls, Los Angeles allowed them to tax the monthly base rate for cell service, and not to tax call details. After passage of the MTSA, Los Angeles sought to enforce its tax on all cell calls within its jurisdiction (which, under the MTSA, includes all calls billed to an account with a Los Angeles address). Verizon sued to invalidate the tax, arguing that Los Angeles had "changed its methodology" for administering the tax and could not do so without a vote of the electorate under Prop. 218. Verizon prevailed in Los Angeles Superior Court and the case is now on appeal.[1]

In light of this trend of cases, agencies which rely on UUTs on telephony should look for an opportunity to seek voter approval of an updated ordinance that reflects the realities of the modern telecommunications industry. Available options to respond to the IRS Notice that do not involve voter approval are beyond the scope of this paper and will be addressed by another presenter at this conference.

2. Transient Occupancy (Hotel Bed) Taxes

2004's AB 1916 (Maddox, R-Costa Mesa) added § 7283.5 to the Revenue and Taxation Code to allow a buyer of a property subject to a transient occupancy tax to request a tax clearance certificate from the taxing agency. The agency must issue a tax clearance certificate, stating the tax due on the property or request the current owner of the property to provide transient occupancy tax records for audit and issue a certificate after the audit is complete. If a tax clearance certificate is issued, the new owner may rely upon the certificate as conclusive evidence of the tax liability associated with the property as of the date specified on the

[1] Verizon's Respondent's Brief in this case notes, but reserves, its claims under the FET theories at issue in the Palo Alto case.

certificate. Any purchaser or transferee who does not obtain such a certificate, or who fails to withhold sufficient funds for the benefit of the City in the escrow account for the purchase of the property, is liable for the transient property tax due the City.

AB 1916 also added § 7283.51 to the Revenue and Taxation Code, which imposes a four-year statue of limitations for any action to collect unpaid transient occupancy taxes. This statute does not apply in cases of fraud or failure of a property owner to file a transient occupancy tax return. Nor does it affect the one-year claiming period for refunds of taxes by taxpayers imposed by a local claiming ordinance, as discussed in section 1 of this paper.

Finally, AB 1916 amended Revenue and Taxation Code § 7280, to impose uniform requirements with respect to forms that must be prepared when a local agency has exempted government officials from its transient occupancy tax. Such a form must (1) require the employee or officer claiming the exemption to provide travel orders, a government warrant or a government credit card issued to pay for the occupancy, and (2) require the officer or employee to provide photo identification and proof of employment.

3. Property Taxes

Following the decision in *Howard Jarvis Taxpayers Ass'n v. County of Orange (City of Huntington Beach)*, 110 Cal.App.4th 1375 (2003), which held that a property tax override to fund pension benefits must be limited to the amount necessary to fund pension benefits approved by voters prior to July 1, 1978 – the effective date of Proposition 13 – the 25 cities which levy such taxes were left with an actuarial quandary. How ought they segregate the cost of pre-1978 benefits from benefits afforded thereafter? To assist in the effort, Senator Harman, (R-Huntington Beach), obtained an Attorney's General opinion clarifying certain issues, 88 *Ops. Calif. Att'y Gen'l* 1 (2005). There, the Attorney General opined that benefits approved by voters prior to July 1, 1978 could be funded even if first awarded thereafter and that "any reasonable accounting method may be used for purposes of determining which costs are not subject to the one percent property tax limitation of the Constitution," *i.e.,* Proposition 13. Still, thorny issues remain and cities confronted with this issue are advised to obtain actuarial and legal advice in determining property tax levies each year.

4. Sales & Use Taxes

The proliferation of websites offering goods for sales, and the close relationship between "bricks and mortar" retailers and their virtual counterparts, have generated interesting problems of tax jurisdiction. Of interest in this area is the recent decision of the First District Court of Appeal in *Borders Online, LLC v. State Board of Equalization*, 129 Cal.App.4th 1179 (2005). Borders paid use taxes to the SBE for internet sales to customers with California addresses under protest and sued for a refund, claiming its internet activity was beyond California's tax jurisdiction. The First District found Borders' website sufficiently integrated with its retail stores

in California to create tax jurisdiction under the federal Commerce Clause. The reasoning of the case might be useful in other jurisdictional disputes between local governments and those virtually present in our communities.

5. Business License Taxes

State and federal law preempt the application of local gross receipts and other business license taxes to savings and loan institutions, whether state or federally chartered. *California Fed. Savings & Loan Ass'n v. City of Los Angeles*, 54 Cal.3d 1, 9 (1991). A recent case extends this rule to hold that a city cannot impose a business tax on a limited liability company wholly owned by an exempt financial corporation if the LLC has elected to be disregarded as a separate entity for tax purposes. *City of Los Angeles v. Furman Selz Capital Management, LLC*, 121 Cal.App.4th 505 (2005).

6. Tax Legislation

The State's lingering structural deficit has led to a number of legislative proposals to reduce barriers to obtaining new revenues for public services. Although Republican opposition to these measures has been unstinting, thus making the 2/3 approval required for Constitutional amendments and tax measures unlikely, legislation worth monitoring includes: ACA 7 (Nation, D-Marin), which would authorize special taxes to be approved by a 55% vote, rather than the 2/3 required by Props. 13, 62 and 218. The bill remains in committee in the Senate as this paper is written. SCA 8 (Simitian, D-Palo Alto) would have allowed school parcel taxes to be approved on a 55% vote, comparable to the vote standard for school bonds, thus allow funding to operate school programs to be provided under the same standard as funding for capital facilities. Senator Simitian withdrew his bill from further consideration last May in the context of budget negotiations. Such proposals can be expected to recur, however.

A measure that succeeded is A.B. 385 (Lieber, D-Mountain View), Chapter 41 of the Statutes of 2006, which amends Government Code § 50079 to allow school districts to exempt from special parcel taxes both senior citizens and recipients of Supplemental Social Security (SSI). While cities have broad power to frame tax exemptions in any manner consistent with equal protection, this statute eliminates any legal question about this practice and should overcome any reluctance of County tax assessors to implement such exemptions.

Two pending proposals of note are A.B. 1030 (Umberg, D-Anaheim) and A.B. 2873 (Wolk, D-Davis). A.B. 1030 would amend the possessory interest assessment provisions of property tax law to exempt from tax the possessory interest arising from a convention of 7 or fewer days in a public convention center. It provides for no backfill of taxes to local governments lost as a result. Cities with convention centers may wish to examine this bill closely. It is pending in the Senate as this paper is written.

A.B. 2873 would authorize counties and the City and County of San Francisco to impose a ¼-cent sales tax to fund transportation purposes, on the approval of 2/3 of voters. It is pending in the Senate Committee on Revenue & Taxation as this paper is written.

7. Fees on Telephone Customers to Fund 911 Response and Related Services

San Francisco imposed a non-voter-approved fee on telephone bills to recover the cost of a significant and costly upgrade to its 911 response system following the Loma Prieta earthquake in 1989. More recently other local governments have implemented similar fees and litigation has ensued in the general law City of Union City, the charter city of Stockton, and against the County of Santa Cruz. The central legal issues are whether such a fee is in fact a special tax or property-related fee for which voter or property-owner approval is required and whether the state 911 fee is preemptive as to some or all local governments.

Mancini v. County of Santa Cruz, 6th District Case No. H028434, is an unpublished victory for Santa Cruz County upholding its fee. Taxpayers' rights organizations successfully opposed publication of the decision.

Telephone carriers challenged Union City's 911 fee and obtained summary judgment in January 2006 on the grounds that the fee was a special tax for which voter approval is required. Union City has appealed and its opening brief is likely to be filed late this year.

The Third District Court of Appeal decided a procedural dispute in *Andal v. City of Stockton*, 137 Cal.App.4th 86 (Feb. 28, 2006), reversing the trial court's decision granting the City's demurrer on the ground that the Verizon and individual plaintiffs had not exhausted administrative remedies before suing for declaratory relief. The Court concluded that administrative procedures need not be exhausted where effective relief cannot be granted – *i.e.*, where the remedy sought is declaratory relief that a fee is unconstitutional – an administrative refund procedure need not be exhausted. This opinion is now final, but the underlying dispute remains to be resolved. Three consolidated cases against Stockton are expected to be tried in March 2007.

I expect continued litigation in this area until the phone industry accomplishes its goal of a published appellate precedent that 911 fees are special taxes requiring voter approval.

8. Utility Rates

The largest open question with respect to Prop. 218's impact on fees is whether ordinary rates for measured consumption of utility services, such as water and sewer charges, are subject to the majority protest proceeding required by Article XIII D, § 6(a) and the substantive rules regarding the use of fee proceeds (such as a ban on general fund transfers) of § 6(b). These

questions were resolved in late July in *Bighorn-Desert View Water Agency v. Verjil*, ___ Cal.4th___, 46 Cal.Rptr.3d 73 (California Supreme Court Case No. S127535, July 24, 2006).

The Court concluded that metered rates for consumption of water are "property related fees" subject to the measure. The ruling also applies to sewer service charges and charges for refuse collection by a government agency, as opposed to a privately contracted waste hauler.

Article 13D of the California Constitution created a category of fees known as "property related fees." Such fees may not be imposed or increased unless a local government conducts a majority-protest proceeding 45 days after mailing notice to all fee payers. Art. 13D, § 6(a). If no majority protest occurs (as is likely, given how difficult it will be to get a majority of property owners to participate), then the agency must submit the measure to a mailed-ballot, majority vote of property owners (voting one vote per parcel) or to an at-the-polls, ⅔-vote of registered voters. Art. 13D, § 6(c). An exception to this second requirement applies to fees for water, sanitary sewer, and trash services. *Id*. These provisions have provoked more controversy and litigation than Proposition 218's assessment and tax provisions.

In 2001, the Supreme Court held in *Apartment Ass'n v. City of Los Angeles,* 24 Cal.4th 830, that a fee is not "property related" and subject to Proposition 218 if it can be avoided by means other than selling the property — such as not engaging in residential leasing or not taking water. The Los Angeles Court of Appeal reached the same conclusion as to metered water rates in *Howard Jarvis Taxpayers Ass'n v. Los Angeles*, 85 Cal.App.4th 79 (2000).

In 2004, the Supreme Court's decision in *Richmond v. Shasta Community Services District,* 32 Cal.4th 409, held Proposition 218 inapplicable to water connection charges on new development because these charges result not from property ownership, but from voluntary decisions to develop property. That decision, however, suggested that charges for continuing service to an existing water meter might be subject to Proposition 218.

Bighorn involved an initiative to reduce the Bighorn district's water rates by half and to require ⅔-voter approval for future rate increases. When the Interim San Bernardino County Registrar of Voters certified that the proponents had obtained sufficient valid signatures to require an election on the measure, the District sued to remove the matter from the ballot on the ground that it exceeded the initiative power created by Article 13C of Proposition 218 by affecting a fee which is not subject to the proposition, impairing essential governmental fiscal powers, and exercising powers the Legislature delegated to the District's Board alone. The trial court ruled for the District and the Riverside panel of the Court of Appeal affirmed. However, the Supreme Court granted review and sent the case back to the appellate court for reconsideration in light of *Richmond*. The Court of Appeal renewed its decision and the Supreme Court granted review of the case a second time.

The Supreme Court's decision in *Bighorn* definitively rejects an argument made by public lawyers since the adoption of Proposition 218 in 1996 that its property-related-fee provisions do not apply to fees based on measured consumption of utility service. That argument reasoned that whether and how much utility service to consume is a voluntary decision and not merely an aspect of property ownership. Writing for a unanimous court, Justice Kennard wrote in *Bighorn*:

> "[D]omestic water delivery through a pipeline is a property-related service within the meaning of this definition [of property related fee]. Accordingly, once a property owner or resident has paid the connection charges and has become a customer of a public water agency, all charges for water delivery incurred thereafter are charges for property related services, whether the charge is calculated on the basis of consumption or is imposed as a fixed monthly fee." *Id*., 46 Cal.Rptr.3d at 81 (citations omitted).

The key phrase here is "for water delivery," so turn-on, turn-off, meter-repair and other charges for services other than ongoing water service itself are not made subject to Proposition 218 by this decision.

As to public agency charges for water, sewer and trash service, this means local governments must comply with the notice and majority protest proceedings of Article 13D, § 6(a), but not the election requirement of § 6(c), because a partial exemption applies to charges for these services. In addition, revenues from water, sewer and government trash service charges are governed by the rules of § 6(b). These generally require that rates not exceed the cost of providing the service and that rate proceeds be used only to provide the service. Transfers from utility accounts into an agency's general fund now must be justified as repayment of a loan to the utility by the general fund or as reimbursement to the general fund of the cost of services provided to the utility. *Howard Jarvis Taxpayers Ass'n v. Roseville*, 97 Cal.App.4th 637 (2002), and *Howard Jarvis Taxpayers Ass'n v. Fresno,* 127 Cal.App.4th 914 (2005), suggest such charges might include the cost of police and fire protection of utility property and the wear and tear on public streets attributable to utility operations. Alternatively, such transfers can be approved by voters as general or special taxes.

Although the *Bighorn* court never mentions *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal.4th 830 (2001) (housing inspection fee not subject to Prop. 218 because imposed on voluntary decision to enter rental market, not mere ownership of property), it expressly overrules *Howard Jarvis Taxpayers Ass'n v. City of Los Angeles*, 85 Cal.App.4th 79 (2001) (metered water rates not property related fees subject to Prop. 218). *Bighorn*, 46 Cal.Rptr.3d at 81 n.5.

Another development of interest to counsel for water providers is the pendency of A.B. 2951 (Goldberg, D-Los Angeles), which is pending in Senate Committee as this paper is written.

That bill would respond to the decision in *San Marcos Water District v. San Marcos Unified School District*, 190 Cal.App.3d 1083 (1987), which forbade public utilities to charge schools and other local government customers the portion of a utility rate which reflects capital costs. As utilities generally cannot charge one customer for costs attributed to another, this left local utilities with a duty to subsidize service to schools and other local governments and no means to raise funds to do so. A.B. 2951, if adopted by the Legislature, would clarify that local government customers of public water and sewer utilities can be charged a non-discriminatory capital facilities rate component or capital facilities fee.

9. General Fund Transfers

As discussed under section 8 above, the *Bighorn* case, together with the *Roseville* and *Fresno* cases impose new limits on transfers from funds derived from government charges for water, sewer and trash collection services. Cost allocation plans and repayments with utility funds of loans from the general fund raise no issues under Props. 13 and 218. Transfers justified by costs imposed by utilities on general fund programs, such as streets and public safety, appear defensible under *Roseville* and *Fresno* cases cited above.

In 1986, the California Supreme Court held that Ventura was entitled to a "reasonable rate of return" on water rates charged to non-City residents, suggesting a return on investment might be earned by any public utility. *Hansen v. City of San Buenaventura*, 42 Cal.3d 1172 (1986). In light of *Bighorn* and *Roseville*, however, *Hansen* would appear to be limited to enterprise funds not subject to Prop. 218, such as electric utilities (electric services are exempt from Prop. 218 under Article XIII D, § 3(b)) and enterprise funds which operate golf courses, community centers, and other non-utility services.

Moreover, both the *Fresno* and *Roseville* cases acknowledge that utility funds can be used to reimburse the general fund for services or for impacts of utility services on public safety services and streets. Nor is there any reason that the voters of a city could not approve a transfer of utility funds as a general or special tax, as a utility user's tax.

10. Storm Water Funding

Given the post-Katrina attention to the serious flood hazards in the Central Valley and Delta and the increasing cost of mandates under the federal Clean Water Act, such as the National Pollutant Discharge Elimination System (NPDES) and Total Maximum Daily Load (TMDL) regulations on effluent from municipal storm water systems, local governments are increasingly looking for means to fund water-quality and storm-water-control programs.

Voter-approved general and special taxes are clearly legal means to fund these services. Los Angeles County imposed such a tax at the November 2005 election. Assessments are

defensible, too, if special benefit can be shown, as will almost always be true for flood control programs, but which may be more difficult to show for water-quality programs.

Imposing a property-related fee in compliance with Prop. 218's mailed ballot vote of property owners or 2/3-voter approval is lawful under Article XIII D, § 6(c). Palo Alto failed in such an effort several years ago, but the coastal community of San Clemente succeeded. Encinitas' Clean Water Regulatory Fee adopted in 2005 without voter approval drew challenge by the Howard Jarvis Taxpayers Ass'n and the City settled the case by agreeing to seek voter approval.

Non-property related regulatory fees (*e.g.*, inspection and permitting fees) are also lawful and do not require voter approval, but must be limited to the cost of the regulatory program for which they are imposed.

Utility fund transfers are lawful under the *Roseville* and *Fresno* cases to the extent it can be shown that utility operations impose costs on storm water program and the transfers do not exceed those costs.

Efforts to establish substantial revenue streams sufficient for the large capital costs associated with these federal mandates have been less successful. An early effort to characterize storm water programs as "sewer" services exempt from the election requirement of Article XIII D, § 6(c) was rebuffed in *Howard Jarvis Taxpayers Ass'n v. City of Salinas*, 98 Cal.App.4th 1351 (2002). That Court concluded that a fee on property tax roll based on the amount of impervious coverage maintained on a parcel was a property-related fee subject to Prop. 218 fee even though property owners could avoid the fee by detaining or treating storm water on-site. The Court also concluded, without substantial analysis, that the partial exemption in Article XIII, § 6(a) for "water, sewer, and trash" fees included sanitary, but not storm, sewers.

The only successful legislation in recent years on this topic was 2003's AB 1546 (Simitian, D-Palo Alto) which authorized the City/County Association of Governments of San Mateo County to impose an annual $4 fee on motor vehicle registrations to fund traffic congestion and programs to mitigate stormwater pollution from roadways in the County. *See* Government Code §§ 65089.11 et seq. A 2004 effort to extent this to the 9-county Bay Area, A.B. 204 (Nation, D-Marin), died in the Senate. Governor Schwarzenegger vetoed A.B. 1003 (Nava, D-Santa Barbara), which would have authorized the Ventura County Watershed Protection District to impose a property-related fee for water quality programs. The Governor's veto statement cited Prop. 218 and reads as though written by the Howard Jarvis Taxpayers Ass'n.

Senator Harman (R-Huntington Beach) twice introduced an Assembly Constitutional Amendment to add storm sewers to Article XIII D, § 6(a)'s partial exemption for water, sewer, and trash fees. If his measure were successful, such fees would be subject to a majority protest,

but not a property-owner mailed-ballot or 2/3-voter election. ACA 10 in the last Legislature never got a hearing and ACA 13 in the current Legislature may meet the same fate. Neither proposal got the support of a single Republican in the Legislature other than the author. Moreover, conservative activists in Orange County tried (unsuccessfully) to prevent Mr. Harman from winning a vacant Senate seat in the June 2006 Primary, but did prevent his wife, Dianne, from winning the Republican nomination to succeed him in the Assembly.

A more narrowly tailored proposal currently pending in the Legislature is ACA 30 (Laird, D-Santa Cruz), which would amend the assessment provisions of Article XIII D, § 4 to allow an assessment to be imposed or increased "to maintain, operate, repair, relocate, or upgrade a flood control levee, which levee was in existence before November 6, 1996 [*i.e.,* the effective date of Prop. 218]" pursuant to a pre-Prop. 218 majority protect proceeding, rather than a Prop. 218-style mailed-ballot election among property owners. The measure was pending final approval in the Assembly as this paper is written, but requires 2/3 approval of both chambers of the Legislature before it can appear on the ballot for voter approval.

11. Regulatory Fees

Generally a local government's power to impose a fee to support a regulatory program is as broad as its police power to regulate. *E.g., Sinclair Paint v. State Board of Equalization*, 15 Cal.4th 866 (1997). However, there are limits on this power, as exemplified by *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern*, 127 Cal.App.4th 1544 (2005). in which the Fifth District Court of Appeal invalidated a regulatory fee that Kern County imposed on those who import sewage sludge into the County on the basis of the use of public roads. The Court cited Vehicle Code § 9400.8, which reads in relevant part:

> "Notwithstanding any other provision of law, … no local agency may impose a tax, permit fee, or other charge for the privilege of using its streets or highways, other than a permit fee for extra legal loads …"

Thus, when calculating service and regulatory fees, caution is advised when attempting to account for wear and tear on public roadways. Because Kern County's fee was imposed on multiple bases, the Court of Appeal remanded to the trial court to determine the portion of the fee which must be invalidated under Vehicle Code § 9400.8.

A recent decision involving a charge imposed on those who extract groundwater may shed further light on this issue. *Pajaro Valley Water Management Agency v. Amrhen*, 2006 WL 2065255 (6th District Court of Appeal, July 27, 2006), upheld the district's charge on groundwater users to fund capital facilities and supplemental water supplies in order to augment groundwater supplies and address saltwater intrusion into the fertile agricultural areas in Santa Cruz County north of Salinas and Watsonville. The Court's reasoning, however, is plainly inconsistent with the *Bighorn* decision handed down two days earlier. The plaintiffs have

requested rehearing and revision of the opinion is likely. The fee can be distinguished from *Bighorn* because it does not involve the provision of domestic water through a pipe, but rather the regulation of groundwater pumping that is doing discernible environmental damage, and thus should survive rehearing in light of *Bighorn*. The case is one to follow for those with an interest in this subject, however.

12. Open Space Assessments

Another question pending before the California Supreme Court is: Does regional open space provide special benefit to private property sufficient to justify assessment financing? The first case to test this question (filed by a retired City Attorney of Beverly Hills) was *BadTax v. Mountains Recreation and Conservation Authority*. In that 2003 case, the Los Angeles Superior Court ruled for MRCA and the plaintiffs abandoned their appeal.

The pending Supreme Court case, being briefed as this paper is written, is *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Auth.*, Case No. S136468. In this case the Authority imposed an assessment under the 1972 Landscaping and Lighting Act to fund a program of future, regional, open-space acquisitions. Because the acquisitions were prospective and the Authority did not want to reveal to landowners exactly how much it might pay for a given site, the engineer had an unusual task in demonstrating specific benefit to private property from the unspecified acquisitions and calculating the proportionate benefit attributed to each property owner in the District from such acquisitions. After twice vacating argument dates *sua sponte*, the 6th District Court of Appeal found, over Justice Bamattre-Manoukian's lengthy dissent, that the unspecified, future regional open space acquisitions sufficiently benefited property to justify assessment and that the spread of benefit was properly determined. Also in issue in the case was the Authority's rejection of ballots submitted on photocopies of an opposition leader's ballot, rather than on official ballot forms, an issue as to which the Authority's ballot-handling resolution was silent. An opinion in the case is not likely until 2007. In the meantime, *Not About Water Comm. v. Solano County Board of Sups.*, 95 Cal.App.4th 982 (2002) is comparable authority that judicial review of special benefit decisions is relatively deferential and reliant on pre-Proposition 218 case law.

Another recent assessment decision exemplifying this judicial deference to determinations of special benefit has been the subject of a "grant and hold" order by which the Supreme Court grants review and suspends briefing pending decision of a lead case, in this case, the *Silicon Valley* case. This is *Dahms v. Downtown Pomona Property and Business Improvement District*, 41 Cal.Rptr. 3d 196, review granted July 12, 2006. The Second District Court of Appeal upheld Pomona's spread of the costs of a property-based Business Improvement District (PBID), allowing exemptions for non-profit entities, giving main street foot-frontage greater weight that rear- and side-yard street frontages in the assessment formula, and treatment of PBID services as necessarily providing special benefit because they were above and beyond the general level of City services. The Court of Appeal's decision was apparently influenced by

the quality of argumentation by the plaintiffs' counsel. Like the *Silicon Valley* case, however, it may be an example of too-broad a victory for local government generating a grant of review by what remains a conservative California Supreme Court.

13. Prop. 218 Initiatives to Repeal or Reduce Revenue Measures

Another area of controversy under Proposition 218 is the scope of the initiative power created by Article XIII C, § 3, which provides:

> "Initiative Power for Local Taxes, Assessments, Fees and Charges. Notwithstanding any other provision of this Constitution, including, but not limited to, Sections 8 and 9 of Article II, the initiative power shall not be prohibited or otherwise limited in matters of reducing or repealing any local tax, assessment, fee or charge. The power of initiative to affect local taxes, assessments, fees and charges shall be applicable to all local governments and neither the Legislature nor any local government charter shall impose a signature requirement higher than that applicable to statewide statutory initiatives."

Among the open questions are: Is a Prop. 218 initiative limited to assessments, fees and charges as those terms are defined in Article XIII D or do they extend to assessments not imposed on property, such a those in issue in *Evans v. San Jose*, 3 Cal.App.4th 728 (1992) (non-property related business improvement assessment collected as surcharge on business license tax), or non-property-related fees? Can a Prop. 218 initiative exercise a rate-setting power delegated directly to a legislative body in contravention of *Committee of Seven Thousand v. Superior Court*, 45 Cal.3d 491 (1988)? To impair an essential governmental function in contravention of *City of Atascadero v. Daly*, 135 Cal.App.3d 466 (1982) (pre-Prop. 62 measure defining "special tax" and requiring voter approval invalid as impairment of fiscal management abilities)? To effectively disestablish an agency without complying with the Cortese-Knox-Hertzberg Act?

The *Bighorn* case discussed in Section 8 above also sheds light on the initiative provisions of Article 13C of Proposition 218. The Court reserved for another day the question whether the fees and charges subject to initiative repeal or reduction by Article 13 C are limited to the property-related fees governed by Article 13 D or whether other fees can be reduced by voters, as well. The Court did, however, make clear that all property related fees — including water, sewer and government trash service charges — may be reduced or repealed by initiative. 46 Cal.Rptr.3d at 84.

The fact that the Legislature has delegated rate-setting power directly to a local legislative body does not alter this rule, because Proposition 218 amended the state Constitution and binds the Legislature, as well. *Id*. at 82.

Curiously, the Court held that the initiative provision of Proposition 218 is limited to measures to "reduce or repeal" revenue measures, because this is the language of the measure. *Id*. at 84. However, federal cases involving the rule of equal protection in the context of ballot access requirements may well raise substantial problems for an interpretation which allows tax reduction measures, but not tax increase measures, by initiative. This remains an open question.

While rates may be reduced or repealed by initiative, the Court invalidated a provision of the *Bighorn* measure which required ⅔-voter approval for future rate hikes, ruling that an initiative under Proposition 218 cannot extend to making new rules for the adoption of revenue measures. *Id*. at 83. This is less helpful to local governments than it appears, however, as the Court noted that Elections Code § 9236 requires voter approval for changes to an initiative measure once approved by voters. *Id*. Therefore, if a rate reduction initiative is adopted by voters, it can be amended by the local agency's legislative body only to the extent the initiative measure expressly allows it to do so. Thus, a rate-reduction initiative will often become a rate cap as well. On this issue, the Court stated:

> "by exercising the initiative power, voters may decrease a public water agency's fees and charges for water service, but the agency's governing board may then raise other fees or impose new fees without voter approval. Although this power-sharing arrangement has the potential for conflict, we must presume that both sides will act reasonably and in good faith and that the political process will eventually lead to compromises that are mutually acceptable and both financially and legally sound." Id. at 84.

The Court does not provide much guidance as to how an agency can "raise other fees or impose new fees without voter approval" without amending or violating an initiative that reduced rates. Can there be two rates for the delivery of water?

Many state statutes require water rate-setting bodies to set rates high enough to cover the costs to provide an adequate and safe water supply. The Court pointed out that it was not deciding whether voters acting by initiative can be held to such rules. *Id*. at 85. The fact that the Legislature is subject to Proposition 218's rules suggests voters might not be. On the other hand, in general, voters acting via initiative have no more power than does a City Council, Board of Supervisors or special district Board of Directors. That would suggest voters cannot set a rate too low to provide a safe and adequate water supply.

Another issue not addressed in the decision has to do with rate covenants in revenue bonds. These are promises to bond holders who bought revenue bonds issued by public utilities to maintain utility rates high enough that the utility can maintain the utility's infrastructure and pay the interest and principal of the bonds. These promises are binding contracts protected by the impairment of contracts clause of the federal Constitution and a rate-reduction initiative that violated such a covenant would likely be invalid.

14. Fiscal Election Issues

The requirements of Propositions 13, 62 and 218 for voter approval of most revenue measures has created the need for a body of election law specific to the issues that arise in this context. A recent Attorney General's opinion sheds light on an aspect of these issues. In 88 *Ops. Calif. Att'y Gen'l* 46 (2005), the Attorney General concludes that a community college district may use public funds to hire a consult to conduct polls and to establish focus groups to assist in framing a bond measure, but may not use such funds to pay the same consultant to develop a strategy to build public support for such a measure. The opinion also concludes, unsurprisingly, that college-affiliated private entities such as "nonprofit foundations, student body associations, and other auxiliary organizations" may use private funds to conduct a "yes" campaign in support of a ballot measure once placed on the ballot. The most useful guide in this area is *Securing Voter Approval of Local Revenue Measures* (1999), a League of California Cities publication which is currently being updated.

Conclusion

Plainly, the pace of legal developments under Propositions 13, 62, and 218 is not slowing down some 10 years after the approval of the latest of those measures. As always, we'll keep you posted!